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In the

Supreme Court of the United States

OCTOBER TERM 1964

No. 899

MURPHY OIL CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY TO BRIEF IN OPPOSITION

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The Government concedes the anomaly of treating a bonus as a capital investment of the lessee for taxable "gross income" purposes and at the same time treating the bonus as an advance royalty for depletable "gross income" purposes.

Its answer is not to justify the merits of such a position but merely to state that this result "is required by long standing Treasury Regulations * * *." (Br. 2.) Petitioner submits that not only is this treatment itself anomalous but the unfairness of this anomaly is aggravated by the fact that these rules are not uniformly administered. See Pet. p. 17 and the Motion and Amicus Brief filed with the Court in the instant case by Ashland Oil & Refining Company.

The Government says that petitioner's position amounts to saying that the peitioner is entitled to double depletion. (Br. 3.) There is a doubling up of the depletion allowance *only* to the extent there is a doubling up of income subject to tax. Moreover, this Court has clearly rejected the notion that there can be only one depletion allowance for each barrel of oil. *Commissioner v. P. G. Lake, Inc.*, 356 U.S. 260 (1958), holds that the seller of a carved-out oil payment realizes ordinary income but subject to depletion. As the production pays the oil payment out, the purchaser also depletes the oil income. Thus, "double depletion" is allowed on the same barrel of oil when such barrel is taxed twice. As a matter of fact, this "double depletion" allowance was the basis of the petition for rehearing in the *Lake* case, which petition was denied by this Court. Accordingly, the Government's "double depletion" argument is without merit.

The Government says (Br. 4.) that *Burnet v. Harmel*, 287 U.S. 103 (1932), did not hold that a lease bonus is an advance

royalty to the lessor. This Court thought otherwise in *Anderson v. Helvering*, 310 U.S. 404 (1940), where it is stated:

> "Cash bonus payments, when included in a royalty lease, are regarded as advance royalties, and are given the same tax consequences. *Burnet v. Harmel*, 287 U.S. 103 * * *."

The Government is not convincing in its attempt to reconcile the conflict presented by the present case and the principles enunciated by this Court in *Burnet v. Harmel*, 287 U.S. 103 (1932), *Anderson v. Helvering*, 310 U.S. 404 (1940), and *Burton-Sutton Oil Co. v. Commissioner*, 328 U.S. 25 (1946). If bonuses, royalties, production payments, net profits interests, and working interests are all included in the pool of economic interests, as they indisputedly are, then the only possible result it to treat them alike. This is what *Burton-Sutton* is saying, based upon the Court's earlier holdings in *Burnet v. Harmel* and *Anderson v. Helvering*. This Court's statement in *Burton-Sutton* that if "they are rents or royalties paid out to one, they are rents or royalties received by the other," therefore, is more than a mere explanation for granting certiorari; it is a commitment to the consistent application of basic oil and gas tax principles. The above decisions of this Court require the bonus to be excluded from petitioner's taxable "gross income" as an advance royalty and the decision of the Court below clearly conflicts with these principles.

As to *Lambert v. Jefferson Lake Sulphur Co.*, 236 F. 2d 542 (5th Cir. 1956), the Government states there "is no real con-

flict" (Br. 4) and at the same time admits that in *Jefferson Lake* the District Court held the payments there involved should be excluded from gross income as an advance royalty, a holding which is in direct conflict with the decision of the Court below in the instant case. The Fifth Circuit expressly stated in *Jefferson Lake* that the District Court "reached the correct conclusion on the grounds assigned by it as its basis." Petitioner submits that this is plainly a holding and plainly presents a direct conflict between the Fifth Circuit and the Court below.

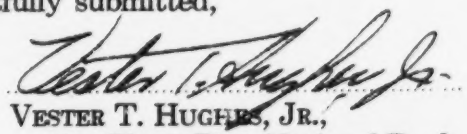
Judge Learned Hand, dissenting in *Canadian River Gas Co. v. Higgins*, 151 F. 2d 954 (2d Cir. 1945), answers the Government's contention that it is not unusual for a payment to be a capital investment to the payor and income to the payee. The Government does not and cannot escape the force of Judge Hand's reasoning, *viz.*, that the *character* of the payment does not change. Once characterized as an advance royalty, which it is to the lessor, it similarly is an advance royalty to the lessee.

The Government has offered no convincing argument on the merits, nor has it overcome the conflict between the decision of the Court below and the *Jefferson Lake Sulphur* case and between the decision of the Court below and principles enunciated by this Court.

Petitioner reiterates that, because of the recurring importance of this question and the need for uniform and fair

administration of the tax laws, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Vester T. Hughes, Jr., one of the attorneys for Murphy Oil Corporation, Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 8th day of April, 1965, I served copies of the foregoing Reply to Brief in Opposition upon the Solicitor General, Department of Justice, Washington 25, D. C., by air mail, postage prepaid, and upon counsel of record who represented the United States of America, Respondent herein, in the court whose judgment is sought to be reviewed, in accordance with paragraph 2(a) of Rule 33 of the Rules of this Court.

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